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1 You were on the stand earlier. May we
2 treat Mr. Christensen as still under oath, Your
3 Honor.

4 THE COURT: Yeah. Mr. Christensen, you
5 understand you're still under oath?

6 THE WITNESS: Yes.

7 THE COURT: Thank you.

8
9 Stephen Christensen,
10 called as a witness, having been previously sworn,
11 was examined and testified as follows:

12
13 DIRECT EXAMINATION

14 BY MR. BOLEY:

15 Q. You understand that the two jointly
16 administered bankruptcy cases before this court are
17 Chapter 11 cases, right?

18 A. Yes.

19 Q. And you understand that at some point
20 what's of significance to the Court and creditors is
21 a plan of reorganization?

22 A. Yes.

23 Q. Let's discuss and share with the Court
24 some of the plans that you've been formulating that
25 will result in a plan of reorganization in payments

1 to creditors, starting first with you and Vicky's
2 personal estate. How do you plan to fund a
3 reorganization?

4 A. Well, we have -- we have the \$300,000
5 that's owed to us as points and fees for being the
6 only guarantor on a refinance under the resolutions
7 of the company. That's about as --

8 THE COURT: I'm sorry, Mr. Christensen.
9 That's owed to you by who?

10 THE WITNESS: I think it's Mountain Home
11 Development specifically, but I say the Traverse
12 Mountain companies. But Mountain Home Development is
13 one of those companies. I think that's the primary
14 obligor on the refinance of what we call the Satori
15 loan. And under the resolutions I was supposed to
16 get paid ten points as the other guarantors took out
17 on the others loans and have already been paid.
18 They've already received their points and fees, but
19 they never -- the companies, Mountain Home
20 Development has refused to pay me those points and
21 fees.

22 There's also the Solitude Development
23 water shares. I think that's more of a VS item than
24 it is if you're just asking me about Stephen and
25 Vicky.

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1 Q. (By Mr. Boley) Just go ahead and we'll --

2 A. Okay.

3 Q. And you can sort through which ones are VS
4 and which ones are --

5 A. There's an option on some water shares
6 that Solitude Investments owned. And we've proposed
7 to dissolve that company. It hasn't done business
8 for maybe five years or so. And sell and liquidate
9 those water shares that aren't pledged or to be used
10 for anything, and that would bring in cash to the
11 estate, the bankruptcy proceedings.

12 There are going to be -- I'm working, as I
13 mentioned earlier, on the fees, consulting and
14 management fees. I've been doing this for 40 years
15 and I have several developments that I believe that I
16 can get increased fees with. And I'm working very
17 hard on doing that right now.

18 There's also the litigation that, I know
19 it sounds awful, you talk about trying to make -- I'm
20 not trying to make money off of the litigation, I'm
21 just trying to defend and protect our family. And we
22 believe in those causes with all of our heart even
23 though they haven't had the funds to fight against
24 Traverse. They're basically using our assets to
25 borrow money and fight us.

1 Q. Let me stop you there. I know that you've
2 talked about claims, and obviously those were listed
3 in the schedules. Some of the claims we looked at in
4 the schedules are not yet pending with any court.
5 There were claims pending in the Judge Toomey case
6 that we discussed. Do you recall that?

7 A. Yes.

8 Q. Now, the Court's probably interested, as I
9 and all the other parties are interested, how this
10 estate with very limited resources is going to take
11 claims and turn them into something other than
12 claims?

13 A. We've been negotiating and interviewing
14 with several law firms to defend us in those claims.
15 And one firm has agreed to defend us in the Toomey
16 case. And --

17 Q. Did you mean the Kennedy case?

18 A. Excuse me. The Kennedy case. I'm sorry.
19 Yes.

20 And the other in -- and we're still
21 negotiating. Some with contingency firms that are
22 very interested. And the firm that's taking the
23 Kennedy case may also end up taking the Toomey case.

24 Q. So in addition to that firm, have you --
25 do you have any appointments scheduled with attorneys

1 to discuss them taking over the Toomey case?

2 A. Yes. I've been negotiating for some time.
3 But I have other meetings next week on Tuesday and
4 Wednesday with two firms on both of those that are
5 very interested.

6 Q. And we spent some time this morning, we
7 looked at the layout of the Traverse Mountain
8 entities as you were discussing what those entities
9 owned and controlled. And we tried to extrapolate
10 from that perhaps what the stock ownership or the
11 member -- the limited liability ownership that's
12 owned by these estates might be worth. What's the
13 plan? How do we take that stock and those membership
14 interests and realize on that to pay creditors in our
15 case?

16 A. Well, I mentioned earlier that the Steve
17 Craig outlets is going to open. And that -- there's
18 residual income that comes in for our shares of those
19 outlets. It's a contracted. I signed and put
20 together with them. And there'll be residual income
21 for as long as that shopping center exists and we
22 have a partnership with them.

23 There is also some additional property
24 that's not part of the first phase. We can enhance
25 that value and get increased value out of it, I

1 believe, and be able to generate more income even
2 though I'm not directly in control of those extra
3 parcels, the companies are.

4 But the -- there's also the -- on the
5 property there's several parcels that apartments
6 could be built on, high-density, single families.
7 Probably over 1,000, maybe 1,000 lots left or more
8 besides the commercial property and the factory
9 outlets. All of that -- all of that could be used to
10 help settle my bankruptcy estate. It's a substantial
11 amount of property and property we worked very hard
12 on. I worked for 40 years for us to be able to get
13 to this point, the time in our life to be able to
14 develop this. So I don't know if that answers your
15 question or not, but...

16 Q. You've talked about one alternative use of
17 the stock is to hold it and wait for income to be
18 distributed by the companies. You understand that's
19 not going to happen until the companies pay their
20 debts, right?

21 A. Yes.

22 Q. Have you explored any other alternatives
23 for the stock?

24 A. We've talked -- I've talked to some
25 company -- or some investors about purchasing our

1 shares, even purchasing the lawsuits because of where
2 we're at, the hardship that we're going through. And
3 there's some interest. They're weighing out and
4 measuring and looking at the litigation and looking
5 at what they think the shares might be worth. And
6 they haven't gotten back to me yet.

7 Q. Are you saying that one of the problems in
8 exploring the sale of the stock is you're unable to
9 provide sufficient evidence or information to a
10 potential buyer so they can evaluate the value of the
11 stock?

12 A. Yes. I mean, the production of documents
13 and having the valuations and all the things that
14 haven't been shared with us in board meetings.
15 There's been transactions that have taken place that
16 have been concealed from us. There's just so much we
17 don't know. We're locked out and frozen out from so
18 much information, even since Judge Toomey's ruling.
19 They stopped holding board meetings. And as far as
20 we can tell, just be doing title searches,
21 transactions are going on and taking place and
22 happening, money exchanging hands. But we were not
23 made aware of it and don't understand and know what
24 all the values are. And it would be -- having all of
25 the information that's needed would really be helpful

1 in determining what the assets -- what we think the
2 assets are worth.

3 Q. Let's be specific. Obviously I've not
4 filed a motion on your behalf for 2004 Examination
5 yet. But what type of information could we ask from
6 the companies that you could then use, based on your
7 expertise, to determine the value of your stock
8 ownership? What documents would we be asking for
9 that we don't now have?

10 A. Well, it'd be -- they joint ventured --
11 Traverse Mountain companies joint ventured would a
12 company called Riverbend. And they haven't told us
13 what's happened with regards to that. They've
14 indicated. I've heard rumors on the street. We've
15 done some title searches, and it appears that they
16 sold out of that partnership without us even knowing
17 and pulled out millions of dollars. I'm sure they're
18 using it to defend -- that's where they get all the
19 money to pay all these people to come here today and
20 fight us on this whole transaction. But so there's
21 -- our family's --

22 Q. So I'm sorry. I probably wasn't very
23 clear. I want -- because it's helpful to me and
24 perhaps the Court to understand. We've said we don't
25 know what the stock's worth. But let's be specific

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1 on what could we ask for that if we obtained it would
2 then tell us what the stock might be worth. What
3 would we ask for?

4 A. What documents?

5 Q. Yes.

6 A. I would ask for the closing transaction of
7 Riverbend, which we're supposed to know every little
8 detail about.

9 Q. Okay.

10 A. Okay. I would want to know about that. I
11 would want to know about most recent appraisals. I'd
12 want to know what they've sold and what value they
13 placed on those properties with Riverbend. And what
14 they transferred them out for and sold them to them
15 for. I don't even know. And our whole family owns
16 35 percent of the entire transaction. And they're
17 sitting on the money or sitting on the transaction
18 and I don't know. So I want all the documents.

19 Q. So you want to see the closing documents
20 on Riverbend?

21 A. Yeah. And more. I'd want -- I'd want --
22 like I said, I'd want to see appraisals. I'd want to
23 know what's happening with regards to hard money
24 loans that they've taken on out. Have they dispersed
25 funds to the shareholders, other shareholders but not

1 me? Have --

2 Q. So you'd want to see what assets are
3 encumbered and what assets are unencumbered, is
4 that --

5 A. Yes. And the terms of the notes and the
6 agreements and the interest rates and who's getting
7 paid money and who's not getting paid. How much are
8 the CEO and CFO and other people and the corporate
9 counsel, how much are they paying corporate counsel?
10 Corporate counsel --

11 Q. So let me stop you there. I'm sorry. I
12 know the judge wants us to get done today. And I
13 apologize.

14 A. I'm sorry.

15 Q. The same information that you need to
16 evaluate what you're selling as a prospective seller,
17 is that the same information that you'll need to be
18 able to provide to a prospective buyer of your stock?

19 A. Yes. They need to know the details of
20 what's happening there.

21 Q. What about -- you mentioned rights of the
22 settlement agreement to repayment of a member loan.
23 How could that effect your reorganization?

24 A. Like I showed, it's like a million-seven.
25 My son loaned them \$400,000. And he has a note. Our

1 family has member loan notes that none of them have
2 been paid back. But there's millions that have been
3 dispersed out to corporate insiders, and it's self --
4 anyhow. Without --

5 Q. So 1.7 million could come in on your
6 member loan? That was listed in your schedules; is
7 that accurate?

8 A. Part of that's Penga, as I talked about
9 before, is the Key Bank loan. Part of that amount
10 is.

11 Q. So it could be used to satisfy Penga?

12 A. Satisfy -- absolutely. And they agreed to
13 do that in a settlement agreement. Sherry
14 Christensen, who's my brother's widow, he passed away
15 when we were doing these -- just before we did these
16 transactions, of brain cancer. But she is having a
17 really hard time, and she has member loans that
18 should be paid as well or could be paid.

19 Q. Let me turn your attention a little bit.
20 Some of the liabilities, maybe the largest
21 liabilities in this case, they're guarantees.
22 They're guarantees to U.S. Bank; is that correct?

23 A. Yes.

24 Q. And are those loans owed principally by
25 what we've referred to as the a Traverse entities?

1 A. Yes. The Mountain Home Development and
2 Fox Ridge Investments or Triumph Commercial
3 Investments, the name they've replaced Fox Ridge
4 with.

5 Q. So to the extent Forge were able to
6 collect or were voluntarily paid by the Traverse
7 entities, that could reduce or extinguish your
8 potential guarantee liability?

9 A. It could.

10 Q. As far as your plan?

11 A. Yes.

12 Q. Let's talk a little bit about what's being
13 asked for today and how that's going to impact the
14 bankruptcy estate if it's granted. Do you understand
15 what the TM parties are asking for? What (inaudible)
16 they're asking for?

17 A. I think I do. They're asking to be
18 removed from the stay so they can go down and start
19 filing other actions against our family basically and
20 these other cases. And it increases our legal costs
21 and --

22 Q. Let me stop you there. Let's turn to
23 Exhibit 6 in the binder with numbers.

24 A. Okay.

25 Q. Are you there?

1 A. Yes.

2 Q. Now, we -- I understand other witnesses
3 have testified in the motion request that the leave
4 being requested from this court will permit the
5 filing of this counterclaim, cross-claim and
6 third-party complaint in the Taylor action. Please
7 tell the Court whether, as of today, there's any
8 action pending against you or VS by any of these TM
9 parties in the Taylor action.

10 A. I don't know that I completely understand.
11 I think all of the -- it looks to me like almost all
12 of these claims are in the Taylor -- well, it's been
13 a long time since I've looked at the --

14 Q. Let me -- it's true there's not a pending
15 cross claim against you in the Taylor action?

16 A. No. I don't believe there is.

17 Q. And it's true that the RICO claims that
18 would be asserted against you in the Taylor action
19 have never been asserted against you or VS in any
20 court.

21 A. I believe that's true.

22 Q. Now, you've been involved in several
23 lawsuits over the last couple of years; is that
24 correct?

25 A. Yes. In Traverse Mountain and 30, 40

1 years before that. I haven't filed maybe -- I had
2 one small case in business that I filed against
3 someone, one or two very small cases. I think I
4 previously testified to that in the bankruptcy
5 preliminary hearings.

6 Q. Based on your experience to date, and
7 based on your business judgment as the manager of two
8 bankruptcy estates, what would you estimate to be the
9 potential legal expense to defend the claims that are
10 listed in this Exhibit 6?

11 A. I don't know. We've spent over a million
12 dollars just in, I think, the Toomey case; which a
13 lot of this is just a repeat of everything that's in
14 there. It's hard to say how much it would cost. I
15 believe it would really -- it would be crushing for
16 us to have to be able to try and do this while we're
17 trying to do our plan or while I'm trying to pursue
18 those other claims to have this one layered in on top
19 of all that. I don't know what the exact cost would
20 be.

21 Q. Could the bankruptcy estate afford to hire
22 counsel to vigorously defend this action in state
23 court?

24 A. I don't believe so. I told you I'm
25 talking to these law firms about contingency cases

1 for the -- about them defending us. And they're open
2 to it and really reviewing it because we have spent
3 so much money that they might try and close -- do the
4 closing legal on those cases. But this is new, and
5 I've not talked to anybody about this. And I don't
6 know, I think this would be very difficult for us to
7 be able to do on top of those other cases.

8 Q. And the cases you referred to, your
9 discussions with counsel, you're asking -- you're
10 exploring the possibility that a firm might, on a
11 contingency fee basis, represent you on cases where
12 you're the plaintiff?

13 A. Yes.

14 Q. And then they would get paid from a
15 positive recovery if you prevail?

16 A. Yes.

17 Q. Are you aware of any firm that's going to
18 defend you on a contingency fee basis?

19 A. No.

20 Q. How would things proceed differently if
21 the Court denies the motion for relief and claims
22 that are asserted against you are dealt with in this
23 bankruptcy case through the normal claims allowance
24 process, as far as expense goes?

25 A. Well, I feel -- I'm feeling really

1 optimistic about being able to defend myself on the
2 existing claims that are in place, absent this. And
3 I'm working really hard on a plan. I've raised a lot
4 of money over the years with investors. And I feel
5 really good about the prospects of what's happening
6 with the outlets and with the cash that's owed to me
7 in this bankruptcy that's not -- I haven't received a
8 penny for our family in four years.

9 Q. I asked the question poorly. I'm sorry,
10 Stephen.

11 A. Yeah. I'm sorry.

12 Q. You're trying to answer my question. It's
13 my fault, bad question.

14 Let me ask it this way. I represent VS
15 Fox Ridge, LLC in this bankruptcy case; is that
16 correct?

17 A. Yes.

18 Q. The scope of my representation does not
19 extent to state court, correct?

20 A. Correct.

21 Q. Mr. Berry represents you and Vicky in this
22 bankruptcy case, correct?

23 A. Correct.

24 Q. Scope of his representation does not
25 extend to state court, correct?

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1 A. Correct.

2 Q. So you have counsel that can represent the
3 estate?

4 A. Here.

5 Q. Here.

6 A. Yeah.

7 Q. Right. You don't have counsel to
8 represent the estate in -- before Judge Taylor?

9 A. No, I don't.

10 Q. And the estate doesn't really have any way
11 to pay for it?

12 A. No.

13 THE COURT: I'm sorry, Mr. Boley. I
14 thought the Christensens had counsel in the Taylor
15 and Laycock matters.

16 MR. BOLEY: Let me address that because I
17 think there's been --

18 THE COURT: Well, just correct me if I'm
19 wrong.

20 MR. BOLEY: I'm not sure if Mr. Lavar
21 Christensen technically is there. But he is not a
22 full-time litigator.

23 THE COURT: Okay. Well --

24 MR. BOLEY: And really --

25 THE COURT: Okay. He's --

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1 MR. BOLEY: Just between you and me, I can
2 honestly --

3 THE COURT: Okay. He's their counsel.
4 You --

5 MR. SHIELDS: I object to counsel trying
6 to testify, Your Honor.

7 THE COURT: You can go ahead and ask
8 questions to get in why he's not well-suited for
9 that. I just, my recollection was they had counsel.
10 And you've answered that. So go ahead.

11 Q. (By Mr. Boley) Mr. -- your brother is
12 Lavar Christensen?

13 A. Yes.

14 Q. And he is counsel of record right now in
15 these two Forge cases?

16 A. Yes, he is. I mean --

17 Q. He agreed to represent you in the context
18 of which (inaudible) currently are in, which is
19 defending the deficiency action and a judicial
20 foreclosure action; is that right?

21 MR. SHIELDS: Objection, again, Your
22 Honor. Counsel is leading the witness.

23 THE COURT: Yes, he is. But we're not
24 going to get through this unless he does for a while,
25 so.

1 THE WITNESS: I think I can answer that.
2 He did it kind of on a conditional basis. He's a
3 congressman too and so he -- January, February and
4 March he's just completely out of commission. So it
5 was limited. He needs help. And he can't be lead
6 counsel during all that time that's going on. It's
7 something that he and I've just talked about recently
8 in those cases now that they're starting up. And so
9 it's recent, and I shared some of that with you. So
10 I don't know that he can be lead counsel. I think
11 that we're going to have to get someone else to be
12 the lead counsel. And he'll try and help them, bring
13 them up to speed and help them with everything they
14 need to do as best he can.

15 Q. So assuming that you can't afford to pay
16 someone else to come in as legal counsel, I think
17 you've already testified you can't, is Lavar, given
18 his limitations on time and experience, able to
19 adequately represent the debtors in this Taylor
20 action if these new claims are permitted to go
21 forward? I know you don't want to say anything bad
22 about your brother. He's your brother.

23 A. No, it wouldn't be. No. I know he really
24 cares about us and wants to help us. But he's told
25 us he needs to not be the lead counsel. And I need

1 to hire someone else to be the lead counsel in those
2 cases and that he'd doing everything he can to help
3 us because he's just in session through the first
4 quarter of next year.

5 Q. It's true he's told you he's not really
6 willing and he doesn't feel he's able to act as lead
7 counsel in any litigation?

8 A. Yeah. I mean, he's shared that with me.
9 That's why I've been talking to these contingency
10 firms and also this one firm that's agreed to take
11 Kennedy, take the Kennedy case.

12 Q. So if we -- if the motion is granted and
13 these new claims are asserted, you'll either have to
14 come up with money to hire someone or you'll have a
15 reluctant part-time lawyer representing the estate;
16 is that fair?

17 A. Yes. I think that's fair.

18 Q. You were here when Brent Manning was on
19 the witness stand, correct?

20 A. Yes.

21 Q. The Toomey case has been pending for over
22 three years; is that right?

23 A. About that, yes.

24 Q. Based on the complexity of these new
25 claims that are to be asserted in the Taylor action,

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1 do you anticipate that those claims could be
2 adjudicated in a state court in a shorter period of
3 time?

4 A. Probably not.

5 Q. Do you anticipate that it would be less
6 expensive assuming you had unlimited funds to pay for
7 counsel than the million or so dollars you spent
8 defending and prosecuting the Toomey case?

9 A. I don't know. It would seem to me that it
10 would be comparable.

11 MR. BOLEY: Your Honor, can I just have a
12 moment to consult with Mr. Berry?

13 THE COURT: Yes.

14 MR. BOLEY: Before I tender the witness,
15 Your Honor, maybe I should check. According to your
16 records, have we offered all of our exhibits?

17 THE COURT: I do not have D and E and P.
18 D, E and P.

19 MR. BOLEY: I'd offer D and E now. I can
20 lay foundation if there's an objection.

21 MR. SHIELDS: No objection, your Honor.

22 THE COURT: Exhibits D and E are received.

23 **(EXHIBITS D AND E ARE RECEIVED.)**

24 MR. BOLEY: And I tender the witness.

25 THE COURT: All right. So you're not

1 offering P?

2 MR. BOLEY: No.

3 THE COURT: All right.

4 MR. BOLEY: It was on our May offer list.

5 THE COURT: Thank you.

6 MR. BOLEY: I had to have one that I
7 didn't offer.

8

9

CROSS-EXAMINATION

10 BY MR. SHIELDS:

11 Q. Mr. Christensen, the 300,000 you mentioned
12 of the points and fees you think is owed to you by
13 Mountain Home Development?

14 A. I can't remember which one of the
15 companies I said. I was estimating that's who it
16 was. Which one of the companies signed that loan, I
17 can't remember. It could have been Fox Ridge
18 Investments or Mountain Home or both.

19 Q. Was that resolved in the Toomey
20 litigation?

21 A. Not that I believe, no. I don't think it
22 was -- the Satori loan were the fees that were owed
23 to me. I don't think that that was addressed.

24 Q. Is that disputed?

25 A. I believe it would be. I just sat down

1 with our attorneys and went back through. As we went
2 through everything, we sat down and went together
3 with Dave Berry and tried to review all the files and
4 records and answer them the best we could. But it
5 was after the resolution was passed. If it wasn't,
6 it would have been an oversight.

7 Q. You said you're going to -- you hope to
8 get -- you're optimistic you'll get some consulting
9 and management fees because you have 40 years
10 experience. With whom are you negotiating to get a
11 consulting and management contract?

12 A. I already mentioned that I'd been talking
13 to my son who has ownership in a couple of projects
14 that he's putting together. And then I talked about
15 a family member that has some large developments
16 going. And then the other people I'm talking --

17 Q. Which family member?

18 A. It's my brother-in-law.

19 Q. What's his name?

20 A. John King.

21 Q. Any others?

22 A. Not in the family.

23 Q. How about outside the family?

24 A. Well, I just listed them. We have -- I'm
25 just now been, just the last three or four weeks,

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1 really trying to negotiate in earnest with other
2 companies. But I don't feel like, you know, I have
3 anything that's cast in stone. And it's stuff that
4 I'm just working on. And I'm putting together a
5 contact list and talking to people that in the past
6 might have been interested in doing that, so.

7 Q. You have no contracts then?

8 A. No.

9 Q. And you've been looking at doing this for
10 many months, haven't you?

11 A. Not reaching out beyond where I'm at right
12 now. I'm reaching out much further to a wider
13 circle. But my son and I sat down and talked about
14 my role in helping him with his entitlements on these
15 projects that he's working on.

16 Q. You certainly have been trying to get
17 these contracts since the bankruptcy. I think you
18 testified at the first meeting you were --

19 A. Yes. And I have with my son. We've been
20 able to talk about putting that together. And we'll
21 be submitting it as part of this plan. I anticipate
22 in the next few weeks trying to turn in the plan that
23 I'll be able to have some more specifics. I'm
24 working really hard on trying to put that together.

25 Q. So your son does have funds then?

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1 A. He's going to be receiving funds. These
2 loans have been approved. His relationship with
3 these other developers are approved.

4 Q. And he's codefendant in these actions that
5 TM company is proposing, correct?

6 A. I'm sorry. I couldn't hear you.

7 Q. McKay is a codefendant in these actions of
8 the TM companies?

9 A. Yes.

10 Q. So could you coattail on his attorneys?
11 Could you coattail on his attorneys? Have one
12 attorney represent both of you?

13 A. I don't know -- what do you mean by
14 coattail? I'm sorry. I'm misunderstanding.

15 Q. Use one attorney. Two defendants use one
16 attorney. McKay and Steve use one attorney.

17 A. Yeah. I believe we have in the past.

18 Q. And you could do that again in this other
19 litigation, correct?

20 MR. BERRY: Objection, Your Honor. I
21 think he's asking for a legal conclusion specific to
22 bankruptcy law. And I don't think he's qualified to
23 answer such a question. Foundation.

24 THE COURT: I'll overrule the objection.
25 I think all he's asking is couldn't you and your son

1 use the same attorney.

2 MR. SHIELDS: Yes.

3 THE WITNESS: I think if there weren't any
4 conflicts, I think that's something -- and depending
5 on how it might affect his credit and his ability to
6 do this, it would depend.

7 Q. (By Mr. Shields) Okay. Now, you said
8 you're talking about someone defending you in the
9 Kennedy case. Who is that?

10 A. Well, we have -- it's Barry Johnson and
11 Lavar as -- not as the lead counsel but just to help
12 him make the transition.

13 Q. And isn't it true you commenced the Toomey
14 litigation? You commenced the Toomey --

15 A. Yes. We filed a minority -- yes, we filed
16 a minority shareholder case against the companies.

17 Q. And isn't it true that you've lost that
18 case via a summary judgment order by Judge Toomey?

19 A. No. She made two rulings in that case.

20 Q. As against the TM companies you've lost,
21 right? Howcroft is the only --

22 A. Yeah. I believe that's correct. The very
23 first ruling. The second ruling she denied the
24 motion to dismiss and the motion for summary judgment
25 and left like -- Brent Manning represented numbers 1

1 and 7, which is punitive damages and many other
2 things with regards to Mr. Howcroft.

3 Q. And you heard Mr. Manning's testimony that
4 Lavar was, I think, the third or fourth attorney in
5 that case, correct?

6 A. Yes. We've had financial difficulty being
7 able to pay for attorneys.

8 Q. And is that the reason --

9 A. Real hardship.

10 Q. Is that the reason the other attorneys
11 would withdraw because they weren't getting paid?

12 A. We, like I said, we paid a million
13 dollars. But no, Todd Shaughnessy was our attorney
14 with Snell & Wilmer, and he got appointed as a judge
15 shortly after. Mike Black was leaving the firm. He
16 was also co-counsel but he was leaving the firm to go
17 to work for Mitchell & Barlow prior Todd Shaughnessy
18 being appointed as a judge. And they had talked to
19 us for months before that. I don't have an existing
20 bill with them. And we were --

21 Q. Did you pay them or did they write it off?

22 A. Huh?

23 Q. Did you pay that firm or did they write it
24 off?

25 A. Well, they agreed -- they kept the

1 retainer and lowered the balance down pretty low.
2 They knew that we had -- there was some work that
3 they thought that we had prepaid. And I met with
4 Bryon Benevento and Todd Shaughnessy, and they felt
5 like it was fair. I didn't ask them to write it
6 down. But they sat down and said we think that
7 because of Mike leaving the firm and so on and so
8 forth, we'll -- this might be a good time. And then
9 shortly after that Todd found out he was going to be
10 judge, appointed to be a judge.

11 Q. How about the Kirton McConkie attorney,
12 did he get paid?

13 A. Yes, they got paid. I think they're owed
14 a small amount. And that's from Sherry. I'm not
15 part of that, but Sherry Christensen.

16 Q. No, in the Toomey case. They appeared in
17 the Toomey case on your behalf as well, didn't they?

18 A. Well, I know. But they represented
19 Sherry.

20 Q. Oh, not you?

21 A. No.

22 Q. Okay.

23 A. And I don't know, you'd have to ask them,
24 but I think most of that was paid down, maybe not all
25 of it.

1 Q. Now, you talked about potential income
2 from the mall outlets and some other sources. But
3 that is in companies you don't control, right?

4 A. Yeah. I don't control and I --

5 Q. So what are you doing there? What do you
6 spend your time doing with those companies?

7 A. Well, I'm not quite sure what the question
8 is.

9 Q. Well, you said if this litigation goes
10 forward you couldn't do that kind of work, get some
11 money. And I'm just wondering what you're doing when
12 you're only a minority interest holder. You have no
13 authority to do anything in those companies.

14 A. I'm sorry. I apologize. I still don't
15 understand the question.

16 Q. How do you expect -- if the Court denies
17 our motion and you don't have to defend yourself in
18 the Forge litigation, what do you intend to do to be
19 able to get income from the Steve Craig mall outlet?

20 A. I'll continue to fight and do everything I
21 can to get what's rightfully our family's interest.
22 And for -- even though I'm minority interest, to be
23 able to receive the money that we're entitled to for
24 those assets and for the Traverse Mountain assets.

25 Q. But as far as day-to-day management,

1 negotiating contract, you don't do anything, do you?

2 A. I don't do that with regards to the
3 outlets, no.

4 Q. Or anything with the TM companies? You've
5 been removed pursuant to the settlement agreement,
6 correct?

7 A. Yeah. I stepped down according to the
8 settlement agreement and agreed to have the company
9 run as a board, which it hasn't. It hasn't run as a
10 board since -- an effective board and an honest
11 board, which is why Judge Toomey denied this summary
12 judgment and talked about what's been going on with
13 Steve Howcroft and the CEO and the CFO with regards
14 to that case.

15 Q. Now, you heard Mr. Manning testify that
16 your statements that you hadn't been provided
17 information from the TM company was part of your
18 lawsuit in the Toomey litigation, correct?

19 A. That I hadn't provided what?

20 Q. No. That the TM companies -- you, this
21 morning you testified the TM companies hadn't given
22 you information, right?

23 A. Yeah. They have not provided some
24 information.

25 Q. And Mr. Manning took the stand and said,

1 yeah, those same claims were made in the Toomey
2 litigation. And you lost on summary judgment,
3 correct?

4 A. Yeah. I think he also talked about in
5 there that because of the change of law firms -- I
6 don't remember if he went over this. It seemed like
7 he did talk about it. We had multiple requests for
8 production of documents for which they filed a quash.
9 They filed every motion in the world to block us,
10 summary judgment motions. And we ran out of money
11 and couldn't get the production of documents that we
12 wanted. We were denied.

13 Q. They won, right?

14 A. In getting those. Huh?

15 Q. Toomey --

16 A. Well --

17 Q. -- granted their motion for summary?

18 A. They've outspent me 10 to 1. And there's
19 been times where I just -- you see it in the fact
20 that the law firms. We've had to change firms
21 because it's been so expensive.

22 Q. And remember, who started that lawsuit?

23 A. Yeah. The minority shareholder case we
24 did. But then the fifth member, independent fifth
25 member of the board decided to sue us. And there

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1 have been other counterclaims that they've filed and
2 are continuing to file now with all this, everything
3 that's going on.

4 Q. The notes that you claim you and your son
5 are entitled to, aren't those notes very subordinated
6 that have to be millions of dollars paid to other
7 creditors before you get (inaudible) --

8 A. And that's the part they're withholding
9 from us. I believe they have done things that would
10 trigger the payments of those, but they won't provide
11 the information. And especially since Toomey made
12 her decision, it's been almost a year and a half,
13 that there's been so much that has been done or not
14 done and will not provide the information that we
15 need to have to be able to defend ourselves in this
16 case. Not only did they block us from getting it
17 before, they quashed everything we tried to do and
18 fought us every step of the way. A lot like I think
19 they're trying to do here. But they just block and
20 block and block and delay and run up legal fees and
21 seek to bankrupt us. And including not paying Penga
22 -- or Key Bank like they were supposed to under the
23 terms of the settlement agreement. I can't handle a
24 \$900,000 default on me.

25 But Ted Heap and Kinnon Sandlin, they've

1 loaned the same amount of money but somehow there's
2 no problem for them in the companies. Only me and my
3 wife are the ones that loaned that money. We loaned
4 it, but only we are being crushed and in court going
5 through this battle. And they're still sitting over
6 here. Ted Heap and Kinnon Sandlin, who loaned the
7 money at the same time I did from the same bank, we
8 all agreed to loan it. And the settlement agreement
9 said all three of us would get paid back together at
10 the same time. And somehow Penga, their hard money
11 lender, buys my note, takes me to a sheriff's sale,
12 forecloses on me and comes after me. And to this day
13 they have never told us, never held a board meeting,
14 never sent me a letter, no correspondence and told me
15 what's happening with their notes. While they drive
16 home every night to their families and their houses
17 and they still haven't -- I don't know what's
18 happened to those notes and having those notes paid
19 off and having those notes taken care of. And so, I
20 mean, that's just part of it.

21 And the legal fees that are defending it
22 and the interest rate that's burning. And now
23 Penga's making motions in this court. And all they
24 are is somebody that came in and bought the Key Bank
25 note so they could come after me and my family and

1 take over our interest.

2 Q. So what is your realistic plan? What do
3 you really expect to do in this bankruptcy case?

4 A. I'll be submitting it to the Court. I've
5 outlined it as best I can today, I believe.

6 Q. But the plan just talks about we were
7 negotiating, we're talking. What is the plan?

8 A. Well, that's what it takes -- you know,
9 this whole thing, like I said, Penga comes in and
10 buys my note but nobody else's with Key Bank and
11 comes after me to crush me. I got caught off guard
12 and blindsided by this. And the other -- they're
13 supposed to have a fiduciary duty, the CEO and the
14 CFO of the company, who also loaned the same amount
15 of money to the company and the companies signed
16 settlement agreements to pay us back, all three of
17 us, we would all be paid back, \$2 million.

18 Q. Okay. We're not going to litigate that
19 case here. Let me ask you another question. You
20 said you've been talking to investors; is that
21 correct?

22 A. Yeah. What I would term to be some
23 investors.

24 Q. And what are they going to invest in?

25 A. Well, I --

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1 Q. What are you proposing that they buy?

2 A. I haven't made any proposals to them. But
3 right now what from what I hear on the street,
4 because I never hear it within the company, the
5 company is trying to sell the sell center, all the
6 fiber inside the project that the company owns, just
7 trying to dump it and dissipate the assets. There's
8 a four-acre parcel they owe free and clear and it's
9 out on the street. And I've heard that they've
10 entered into agreements. Whether or not they have or
11 not, they won't tell us. They haven't held a board
12 meeting to let us know.

13 Q. You're getting off. The question is --

14 A. Yes. Because I talked to investors about
15 trying to buy those or come in and refinance those
16 loans. They're giving away property, just dumping
17 property and trying to get out from under loans that
18 they're signed on that I'm not signed on.

19 Q. Well, let me ask again. The investors
20 you're talking to don't have to do with your assets,
21 they have to do with the TM company assets?

22 A. Well, yeah. But given the resolutions and
23 given the operating agreements and given all that's
24 happens where there's no transparency, nothing going
25 on. The first thing I hear is when they foreclosed

1 on a commercial piece of property, I don't even get
2 notified to go to the hearings for the commercial
3 property. They're gone. We just lose them in a
4 foreclosure --

5 Q. Isn't that --

6 A. -- to U.S. Bank. They're gone. U.S. Bank
7 foreclosed on the commercial pieces, gone off the
8 freeway. We worked our lifetime to put those
9 together. So I go off and try and sit down under
10 this resolution where it says they passed it, three
11 to two, their favor. They passed it. Under that
12 resolution it says I can go buy loans if they're in
13 default or if I'm a guarantor, to protect my family.

14 And Steve Howcroft testified in his own
15 deposition that said I had every right to go out and
16 do whatever I need to do to protect my family, when
17 we look his deposition in the Toomey case. And he's
18 the fifth board member. He said Steve absolutely has
19 a right to go off and defend his family and protect
20 himself on these loans. And that's what I've been
21 trying to do. I've been trying to do that so I don't
22 end up bankrupt at 63 years old.

23 Q. And so you --

24 A. Because some people want to take over my
25 ownership interest in a company.

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1 Q. So you think an investor is going to
2 invest in this mess?

3 A. I'm trying.

4 Q. You think this mess can be resolved
5 without litigation?

6 A. I don't know. But I'm trying.

7 Q. So you're going to file your plan by the
8 15th according to the Court's orders?

9 A. Yeah. I'm going to do the best I can with
10 what limited information I have from Traverse
11 Mountain.

12 Q. You're going to file your taxes by the
13 same date?

14 A. I'm working on it with my accountant.
15 I've turned in the other two years, as requested. I
16 just got the K-1s just a few weeks ago.

17 Q. For what year?

18 A. Gave them to -- huh?

19 Q. For what year?

20 A. For 2011.

21 Q. And you'd have the other K-1s --

22 A. Yes. I've turned in 2000 --

23 Q. Just a minute. You've had the other K-1s
24 for years, haven't you?

25 A. Yeah. But I didn't have -- I testified

1 under oath for the trustee that I didn't have enough
2 information from Traverse Mountain. My accountant
3 didn't have enough information for us to be able to
4 file. I felt like I needed to get more information
5 from them to be able to do it. We've since done it,
6 and we're working on 2011. But it's short notice to
7 try and be able to put this together. They filed for
8 an extension until October. And so I'm trying to put
9 those together. I've been talking to my accountant
10 right up until the time, just days before here,
11 yesterday.

12 Q. Bottom line, all your problems are other
13 people's fault?

14 A. What?

15 Q. All your problems are other people's
16 fault?

17 A. For the first 11 years of that project I
18 didn't blame anybody for Cabela's, for the factory
19 outlets, for 8,000 homes that I zoned in and titled
20 with my brother and my family when we were in control
21 of the company. All the entitlements and all of the
22 closing, everything that's happened, the factory
23 outlets, we got. We brought them there. We signed
24 them. We put that together. All of those projects
25 we put together. I didn't blame anybody for

1 anything. And I didn't --

2 Q. How about this --

3 A. -- try and take credit for anything.

4 Q. How about this, is this your first --

5 A. I'm not blaming. Let me just tell you
6 something. I am not. I'm going to try and answer
7 your question. When they take out 6, 7, 8 million,
8 pay corporate counsel, salaries, travel, legal fees
9 for millions of dollars and I got widows on my side
10 of the ledger and I can't get 50 cents from this
11 company. They're sitting on piles, millions of
12 dollars right now that they sold out of that deal
13 with Riverbend that I mentioned, and we don't even
14 know about it.

15 Q. Listen. Listen. We don't want to --

16 A. I don't know about them. My family
17 doesn't even know about it. Our assets have been
18 swept out the door. They hold them all. They're
19 sitting there. They won't pay Forge or U.S. Bank or
20 Cabela's, who's suing them for \$3 million. No
21 creditors get money except their buddies, their
22 cronies and them. And so you sit down and say I'm
23 making excuses? I'm sorry. I'm -- you know, I have
24 to (inaudible) paperwork and documents --

25 Q. Let me ask you another question and I'll

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1 end, okay? Let me ask you real quick. Is this your
2 first bankruptcy?

3 A. No. It's my second one.

4 Q. Thank you.

5 A. In 1980 during the savings and loan
6 crisis. I had to file because the savings and loan
7 went bankrupt. The largest savings and loan in
8 America filed bankruptcy and took our family and
9 everybody else down with them. The RTC took over
10 everything. And that was 1985 maybe.

11 And I'm only here because of what's
12 happening with Traverse Mountain and Penga and them
13 buying this Key Bank loan. And I'm telling you, I'll
14 come back and testify again and again and again if I
15 can get that information and find out why Ted Heap
16 and Kinnon Sandlin, who loaned the same amount of
17 money from Key Bank -- Key Bank loaned to all three
18 of us the money. And we paid that money, and they
19 haven't had to do anything. The company has not
20 taken care of -- have not taken care of me but
21 somehow protected and shielded those two men and
22 their families from what happened. And so --

23 MR. SHIELDS: Your Honor, I have no
24 further questions.

25 THE WITNESS: I'm sorry.

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1 MR. BERRY: Just one follow-up question,
2 Your Honor.

3
4 CROSS-EXAMINATION

5 BY MR. BERRY:

6 Q. In your prior chapter --

7 MR. SHIELDS: Is this recross? I thought
8 Mr. Boley was having --

9 THE COURT: Mr. Shields.

10 MR. SHIELDS: Okay.

11 Q. (By Mr. Berry) The question was asked
12 about a prior Chapter 11 you filed. That was a
13 Chapter 11?

14 A. I believe it was a Chapter 11, yes.

15 Q. And you finished it, you got your
16 discharge? It was consummated?

17 A. Yes.

18 Q. Thank you.

19 THE COURT: Mr. Christensen, are you okay?

20 THE WITNESS: Yeah. I'm sorry, Your
21 Honor.

22 THE COURT: No. It's -- no, it's your
23 life. It's okay.

24 THE WITNESS: No, I know. I'm sorry. I
25 apologize.

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1 THE COURT: All right. I don't think
2 anybody else has any questions for you. You're
3 excused.

4 THE WITNESS: Thank you.

5 MR. BERRY: Your Honor, if that's the
6 close of evidence then I would ask for a brief
7 recess.

8 THE COURT: I can't hear you.

9 MR. BERRY: If that's the close of
10 evidence, I would ask for a brief recess.

11 MR. BOLEY: That's the end of our
12 evidence.

13 THE COURT: All right.

14 MR. BOLEY: Unless there's rebuttal.

15 THE COURT: You want a few minutes before
16 you argue?

17 MR. BERRY: Yes, please.

18 THE COURT: I'm sorry. You have more --

19 MR. BOLEY: I think we need a short break
20 for a matter of personal convenience.

21 THE COURT: Okay. But you're done with
22 your evidence?

23 MR. BOLEY: We are, Your Honor.

24 THE COURT: Okay. Thank you.

25 THE BAILIFF: All arise.

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1 (Break taken from 2:13 to 2:29 p.m.)

2 THE BAILIFF: All arise. Court resumes
3 its session.

4 Please be seated.

5 THE COURT: All right. It's still six
6 three Giants, if you're wondering.

7 All right. Mr. Shields, go ahead.

8 MR. SHIELDS: Your Honor, I'll try not to
9 bore. I just want to briefly review that evidence a
10 little bit. The reason we went to such laborious
11 details on the schedule is to show, by the debtors'
12 own statements under penalty of perjury, there's
13 really not much here but litigation. Of the hundred
14 and something million in the two estates, 95 percent
15 of it is just claims. They're claims, the 50
16 million, the hundred, 25 million, they could be high,
17 they could be low. This estate is essentially
18 claims.

19 As I stated in the first status
20 conference, we were hopeful that the debtor had a
21 good faith plan of reorganization, that it wasn't a
22 litigation tactic. But we think it is a litigation
23 tactic. Also, even the debts, if you look at the
24 debts in both estates, the bulk of the debt is Forge,
25 25 million of it is Forge. There's a few, you know,

1 a million and a half to his son, some to his
2 neighbor. Everything else, all the claims that my
3 clients and the other creditors, they're all unknown,
4 disputed. Everything relates to litigation,
5 unfortunately.

6 You go to the hard income, schedule I,
7 he's only got income of \$3,008 per month, social
8 security income. He's hoping to get some contracts,
9 but he hasn't. And he's been trying for long before
10 today.

11 Seven lawsuits that most of those he's
12 initiated and lost. The Toomey case I think it's
13 just unbelievable relevant that he started that case.
14 Summary judgment was granted against him. The only
15 claims left are my claims. I want to make it very
16 clear, my client is not trying to litigate two
17 forums. What we've done in our reply memo we
18 explained, we're willing to leave the Toomey case
19 stayed with the exception of getting the motion for
20 protective order amendment heard. We need that to be
21 able to use the evidence in the litigation.

22 We're also stipulating that the Laycock
23 and Taylor cases can be consolidated, and Forge has
24 already moved to do that. So all we have to do is
25 file a no opposition. I think those will be

1 consolidated. So there'll be one forum in which the
2 TM companies, Forge and the debtors and the other
3 parties that are not before this court can litigate
4 that matter.

5 The cross-claim, third-party complaint and
6 counterclaim is critical because the debtor had
7 accused us of trying to be unspecific, vague. And so
8 we spent a lot of time, our cocounsel has testified,
9 spent a lot of time putting that complaint together,
10 that pleading together. And that has the claims in
11 there. There's no ambiguity about what we're
12 pursuing, about who we're pursuing and about the
13 theories. They're well documented, will be filed
14 under Rule 11 if this court allows that litigation to
15 proceed.

16 I don't want to go through all the
17 exhibits that deal with who said what about the stay.
18 The bottom line is there was controversy about the
19 stay. Fortunately the state courts, I think, made
20 the right decision and said whether or not the stay
21 applies, it ought to be determined by this court. We
22 support that. We're here.

23 We have filed a motion for stay of relief
24 on a conditional basis. And that condition is if
25 Forge gets relief, then we need relief. If it's so

1 -- if the situation with the debtor is so pathetic
2 that they shouldn't have any stay of relief, then
3 don't grant anybody stay of relief. But we think if
4 Forge is going to get stay of relief, we absolutely
5 have to get stay of relief to fully defend ourselves.

6 The two exhibits that I think are most
7 critical are the 9 and 10. Those are the two orders
8 by Judge Taylor and Judge Laycock. And they both
9 hold they're not going to proceed in those cases
10 without these debtors. They used the word
11 indispensable party, quote Rule 19. Late yesterday I
12 got the supplemental from the debtor where they're
13 attacking them saying, oh, they're not indispensable.
14 They shouldn't have ruled that. But the bankruptcy
15 court can't sit as an appellate judge for Judge
16 Taylor and Judge Laycock. They've ruled that. It's
17 before the Court. If they're wrong, they can go down
18 and defend that in appeal or whatever. But that's
19 the status of the case right now.

20 The protective order was huge because
21 there's hundreds of thousands of dollars of discovery
22 that's tied up in that litigation that would not be
23 able to be used unless we get relief from that
24 protective order. So we're limiting our relief in
25 the Toomey case to get relief from the protective

1 order. She could deny it. We don't think so. It
2 almost sounds like Forge and the other parties want
3 that protective order lifted too so they can get
4 access to those records. That's fine. To the extent
5 we use them in Forge, they will have access to them
6 in the Forge litigation.

7 The other reason that I think this
8 litigation has to go forward is this court cannot
9 hear those claims between non-debtors. There are a
10 lot of non-debtors claims and cross-claims and they
11 can't be heard in the bankruptcy court. So the idea
12 of consolidating the whole thing here is not
13 feasible.

14 This debtor really has nothing to build a
15 case around. He has no inventory. He has no
16 collectible accounts. He has no employees, no sales
17 force, no product to sell. He's basically got
18 litigation claims that have accrued over many years.
19 And as you can tell, there's frustration built up.
20 My client didn't testify because the same frustration
21 would flow out. The impact of this litigation on his
22 ability to run the company has been profound. We
23 need to get this litigation resolved once and for
24 all.

25 The Court has already granted relief as to

1 Howcroft. And they made those same arguments. And
2 it sounds to me like they're making arrangements to
3 get counsel. You know, this debtor has resources.
4 First of all, his brother is already counsel of
5 record in those cases. And he may want the best, but
6 I may not be the best. Not everybody gets the very
7 best counsel. But sometimes those claims have to be
8 resolved before this reorganization claim -- this
9 reorganization case can go forward. And we believe
10 the time is now.

11 We believe that Forge has met its burden
12 of showing cause for relief from stay. We believe
13 the debtor has failed to negate that cause. They
14 have some reasons. They have some excuses. But none
15 of them, I don't think, meet the standard of why this
16 stay should not be lifted.

17 Even if the parties aren't indispensable,
18 it's undisputed that they're inextricably linked.
19 And that is one of the standards for proceeding
20 without a debtor is if they're inextricably linked.
21 I think the case law in both Utah, the Tenth Circuit
22 and other states say if parties are inextricably
23 linked, they should be in there. And there's no
24 doubt when you're alleging conspiracy against Forge
25 and the debtors that they're in inextricably linked.

1 The debtor argues in its opposition memo
2 that our claims are open-ended. They're dreamed up,
3 they're extraordinary, they're multiple, they're
4 duplicative, we're just creative minds. There's no
5 substance to them and that they're vague. We think
6 all of those are answered by the fact of Exhibit 6,
7 which is a very specific, written-down pleading. And
8 we don't deny we're trying to -- we've moved the
9 stuff that was going to be heard for Toomey as our
10 counterclaim. We're going to put it over in the
11 Forge and hear it because it must be. It has to be
12 heard by one judge if you're going to be economically
13 efficient about it.

14 We think that the prejudice to the TM
15 companies would be profound if the Court were to
16 grant Forge's motion and not grant our motion.
17 Again, if the Court thinks that the debtors'
18 situation is such they shouldn't have to defend
19 anybody, then don't grant Forge motions and we'll
20 just sit here for a few more months. Our position is
21 that we have to grant the Forge motion. We have to
22 grant our motion. We have to get that litigation
23 going. And if that results in some resolution or
24 some investors coming in or something, that will
25 result in the resolution of the case. Sitting as it

1 is is not getting this case anywhere. We'd ask that
2 the motion be granted.

3 Unless the Court has any questions.

4 THE COURT: Give me again, on the record,
5 the specific relief you're requesting for the three
6 different lawsuits.

7 MR. SHIELDS: As to the Toomey case,
8 relief from stay to be able to have the hearing on
9 the motion to amend protective order be heard, ruled
10 upon and implemented. As to the Laycock case, we
11 would agree that that could be consolidated into the
12 Taylor case. In the Taylor case we'd ask that the
13 stay be lifted so we can fully defend ourselves
14 against Forge's claims and pursue our cross-claim,
15 counterclaims and third-party complaints.

16 We would not try to execute on anything in
17 that case. Once we get the judgment determination
18 we'd bring it back here, just like Howcroft did.
19 Same relief. They said we'll bring it back once the
20 matter's determined. We're not going to try and get
21 a judgment executed on assets. But we don't want to
22 get a judgment one way or the other. You know, if we
23 lose, you ought to know about it. If we win you,
24 ought to know about it. So we bring that back to
25 Your Honor.

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1 Any other questions?

2 THE COURT: No. Thank you.

3 MR. SHIELDS: Thank you, Your Honor.

4 THE COURT: Mr. Berry.

5 MR. BERRY: Your Honor, I'd like to start
6 out by addressing the Court's concern as to who has
7 the burden when that shifts, and Tenth Circuit
8 rulings. So yes, section 362(h) on its face says
9 equity -- burden as to equity is as to the movant.
10 And all other burdens are to be borne by the
11 nonmoving party, the debtor. The Court then
12 correctly notes, to some extent any way I would
13 agree, that the only thing that the movant in this
14 case had to show is that there was pending
15 litigation. Now once they've shown pending
16 litigation, the burden shifts to the debtors, the
17 non-movants in this case.

18 If I just stop there before I get into the
19 Tenth Circuit rulings, what we end up with is, yes,
20 there's litigation in the Taylor case. But no
21 litigation of any causes of action against these
22 debtors, none. We've shown that unambiguously
23 through both testimony and Exhibits A, B and
24 comparing them with 6. There was -- there is still,
25 currently, no litigation against these debtors in the

1 Taylor case, which is what they are really ask --
2 seeking this Court to get relief so that they can go
3 file new causes of action in the Taylor case. None
4 existing now, zero, nada. So I think they fail at
5 that point, at that initial hurdle the Court put in
6 front of them. They can't show there's any
7 litigation in which they have any pending cause of
8 action in the Taylor case.

9 And this Court does not have the ability
10 or the power, nor should it, to be able to go and
11 tell the state courts where this court views things
12 should be consolidated. We don't have that ability.
13 The movant doesn't have that ability. They don't
14 have the power. They don't have the ability. They
15 seek to create new causes of action. And by their
16 own words, consolidate causes of action into the
17 forum of their choice where it does not exist now.
18 They fail.

19 As to -- that leaves the Toomey case. In
20 the Toomey case the only thing they're asking for is
21 leave to amend a protective order. This Court can
22 grant leave, limited leave for them to seek change of
23 that protective order before Judge Toomey. And
24 that's all they're asking for. Countering their very
25 arguments that they want to consolidate, they at no

1 time have ever said they are willing to dismiss their
2 causes of action in the Toomey case. No, they want
3 to have litigation in two forums at the same time.
4 They may say, I don't choose to pursue it at this
5 point. But that doesn't mean we don't have causes of
6 action pending before two different tribunals, being
7 duplicated and added to.

8 THE COURT: Well, I'm pretty sure all
9 they're saying is they don't want to step off this
10 ice floe before they know the other one's safe.

11 MR. BERRY: No. It's gamesmanship, Your
12 Honor. It is pure gamesmanship. It's well beyond
13 that. If that conclusion that the Court is surmising
14 were true, they would agree to dismissal without
15 prejudice in the Toomey case. That would have been
16 part of the pleadings. And I specifically asked that
17 question of counsel. No, he has not heard that
18 they're willing to do that. No. And this Court
19 cannot somehow assume otherwise. That means we're in
20 duplicative -- you may want to assume otherwise, but
21 it's not the evidence before the Court. We have them
22 seeking to have litigation in two forums of the exact
23 same causes of action and then a lot more.

24 THE COURT: But isn't that certainly an
25 argument to be made before Judge Taylor in a hearing

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1 on a motion to file the amended pleadings?

2 MR. BERRY: No.

3 THE COURT: I mean, certainly Judge Taylor
4 can tailor relief such that he says, well, I'll allow
5 you to amend in this case as long as you dismiss in
6 the other case. We don't want the claims pending in
7 two places as once.

8 MR. BERRY: No.

9 THE COURT: It just seems to me it's
10 something that can be handled fairly easily.

11 MR. BERRY: Number one, this Court can't
12 direct them to do that. Number two --

13 THE COURT: I wasn't even thinking of
14 that.

15 MR. BERRY: Number two, this Court -- this
16 Court, I think, has a duty to make sure duplicative
17 litigation is not occurring. So unless this Court is
18 going to enter an order, if that's what the Court was
19 contemplating, arguendo, that they get, that they
20 have or may have leave in the Taylor litigation. It
21 should be -- that order should be contingent upon
22 them first dismissing in Toomey, at least without
23 prejudice. Otherwise --

24 THE COURT: But Mr. Berry, I don't have to
25 do that. Your client already has the injunction in

1 their favor. They're not asking for relief from stay
2 to pursue the Toomey action other than as to the
3 protective order. And the rest of the action is
4 stayed.

5 MR. BERRY: I understand the Court saying
6 that. But I don't understand them getting leave to
7 actually have two -- have new causes of action filed
8 in a new case. That they get to choose a new forum.
9 And that's what this Court would be allowing them to
10 do.

11 THE COURT: Allowing them to ask.

12 MR. BERRY: I think it's this Court's duty
13 to not allow that to happen. They don't have that
14 cause of action before Taylor. They don't. And if
15 we really go through it, things don't really transfer
16 straight across. If you start looking at Exhibit --
17 may I grab my exhibits again, Your Honor?

18 THE COURT: Yes.

19 MR. BERRY: I think they're Exhibit 6 and
20 Exhibit E; E being the Toomey pending counterclaims.
21 And they are limited to four. I'm sorry, it must be
22 exhibit -- yeah. The first cause of action is breach
23 of contract in the Toomey action; breach of the
24 settlement agreement, page 31; interference with
25 business dealings, which is again stated as breach of

1 contract by Steve Christensen and McKay Christensen;
2 third claim for relief, intentional interference with
3 the prospective economic relations, that's page 40.
4 So the summaries on 39, 40 and 42, breach of
5 fiduciary duties. That's it. Aiding and abetting
6 breach of fiduciary duties is number 5. So the
7 summary is in pages 39 to 43.

8 If you compare those to what they're
9 trying to do in Exhibit 6, it doesn't really
10 transfer. They embellished everything and added wire
11 transfers, RICO causes of action, racketeering;
12 things that should be sending up red flags all over
13 the place to this Court because they are basically
14 going for 523 nondischargeability actions. And
15 they've never even been pled in either case before.
16 Not in Toomey. Not in Taylor. Not in Laycock. They
17 are new. And those types of things are specific to
18 this Court. I'm sorry, Your Honor.

19 THE COURT: RICO claims?

20 MR. BERRY: Racketeering. I don't know
21 what else to call it.

22 THE COURT: When you say "this Court," are
23 you talking about me? Specific to this Court? I
24 miss your point.

25 MR. BERRY: Well, I'm saying 523 actions

1 are nondischarge, Your Honor. I think -- they're
2 alleging new causes of action that they've never
3 alleged before that really have roots in section 523,
4 and they never existed prior to this Exhibit
5 Number 6.

6 THE COURT: Okay.

7 MR. BERRY: I don't see those in Toomey.
8 I'm sorry. I didn't know if the Court was leaving
9 or --

10 THE COURT: Just making a reach here.

11 MR. BERRY: All right. Finally, Your
12 Honor, okay, so the Toomey case, I think they're down
13 to -- I think if they want to dismiss their causes of
14 action, let them dismiss it. Then maybe there's --
15 there may be, but I don't agree that there's grounds
16 to add new causes of action in Taylor. But I don't
17 see it because they don't really transfer across the
18 way they did. But Toomey, I think they've limited it
19 to, and I agree, to the protect order. The Court may
20 well grant that.

21 But to add new causes of action in the
22 Taylor action, I'm not aware of any case that lets
23 them start suing fresh, new, in a case that they've
24 never brought an action against either of these
25 debtors prior to what they tell us they want to do

1 here today or two days ago. There's no case law in
2 the country that says they can bring brand new, brand
3 new litigation they've never brought before. And
4 seek leave of the court to have it done in state
5 court. I'm not aware of it.

6 Tenth circuit, even though the Court says
7 the burden is now on the debtors, pretty much says
8 otherwise. The statute reads on its face, the way
9 the Court read it. But the Tenth Circuit in our
10 brief, Rouse, Curtis, others, Walker, it's really a
11 balancing test. And really there's a presumption
12 that there could be, should be harm to the debtors.
13 It's really somewhat the opposite of the way the
14 Court characterized it when one reads Curtis, when
15 one reads Rouse. It's assumed there's prejudice.
16 Quite frankly, otherwise there'd be no reason to have
17 an automatic stay. It would be just on the burden of
18 the debtor to come in and say, no, we need to stop
19 these other actions. And then that would be our
20 burden from the get-go. But the code does the
21 opposite. It creates the automatic stay. That's why
22 they have to bring their motions. And I think Curtis
23 emphasizes that. Rouse emphasizes that. Walker
24 emphasizes that. It's a balancing test.

25 And they really are trying to start

1 litigation. And pretty much if they start over again
2 in Taylor, they're reopening discovery from the
3 get-go. Taylor will have to reopen discovery from
4 the get-go, discovery already done in the Toomey
5 case. I don't know any way to get around that
6 conclusion. For the Court, me, or the other parties.
7 They're clearly trying to reopen discovery and start
8 over again by realleging, making those claims in a
9 new case. Why did they pick Taylor? Why do they get
10 to pick Taylor? The balancing test has to fail.

11 Yes, Curtis factor number 1, would final
12 litigation in state court, at least come to a
13 conclusion? Yes, it probably would. Probably would
14 in almost all cases. Question is should it be there
15 and should it be in the Taylor case? I think that
16 answer is no. They've never brought them there
17 before. They're manipulating. And they're asking
18 this Court to help them manipulate and start over
19 again.

20 Lack of any -- item number two, lack of
21 any connection with or interference with the
22 bankruptcy case. Obviously it's interfered. It's
23 raised a lot of costs. They're trying to pick new
24 forums. They're trying to somewhat impose, through
25 the way they've manipulated their motion for relief

1 that, hey, they would say, Judge Toomey can't go
2 forward. Therefore, Judge Taylor, you have to let
3 these new cases go forward. I mean, they're
4 manipulating the Court, this Court, to some extent,
5 to pick Judge Taylor as the right forum. And there's
6 been no evidence before this Court that they've
7 presented as to why they should pick one of those
8 three over any of the others. They have failed.

9 Seven, I'm sure Forge will come up and
10 talk about Curtis factor number 7, whether litigation
11 in another forum would prejudice the interest of
12 other creditors, the creditors committee and other
13 interested parties. If it's done through the proof
14 of claim process, they file an objection, we have a
15 trial on our issues before this Court. Other parties
16 were being effected, in effect maybe diluted out by
17 their claims, can come in and say, I don't want to be
18 diluted out. I don't want my percentage of a pot to
19 be reduced. Because you can simply overpower them
20 with legal fees and costs. Yes. I think seven fails
21 for the movants in this case. Other parties have a
22 strong argument as to why they want to be involved.

23 Judicial economy and factor number 10 from
24 Curtis, I think I've already hammered on that well
25 enough. I think they're trying to reopen litigation